Supreme Court, U.S.
FILED
DEC 9 1997
CLERK

No. 97-753

In The

Supreme Court of the United States

October Term, 1997

MILWAUKEE BRANCH OF THE NAACP, et al.,

Petitioners,

v.

GOVERNOR TOMMY THOMPSON, et al.,

Respondents,

WISCONSIN ASSOCIATION OF TRIAL JUDGES, et al.,

Respondent-Intervenors.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS AND RESPONDENT-INTERVENORS IN OPPOSITION

JAMES E. DOYLE
Attorney General
PETER C. ANDERSON*
Assistant Attorney General

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707
(608) 266-9595
**Counsel of Record*

THOMAS L. SHRINER, JR.
RICHARD M. ESENBERG
MICHAEL J. APRAHAMIAN

Attorneys for Respondent-Intervenors

Foley & Lardner
Firstar Plaza
777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400

2 cpp

PARTIES TO THE PROCEEDING

Actual parties to the proceeding in the Court of Appeals were:

Milwaukee Branch of the N.A.A.C.P., Felmers Chaney, Vincent Knox and Barbara White,

Petitioners herein,

Wisconsin Governor Tommy Thompson, Wisconsin Senate President Fred A. Risser, Majority Leader of the Wisconsin Senate Charles Chvala, Minority Leader of the Wisconsin Senate Michael G. Ellis, Speaker of the Wisconsin Assembly Ben Brancel (David T. Prosser, Jr., held this office when the notice of appeal was filed), Majority Leader of the Wisconsin Assembly Steven M. Foti (Scott R. Jensen held this office when the notice of appeal was filed) and Minority Leader of the Wisconsin Assembly is Walter J. Kunicki, all appearing in their official capacities; all of these officials continue to hold the foregoing offices except that Scott R. Jensen is the current Speaker of the Wisconsin Assembly,

Respondents herein, and

Wisconsin Trial Judges Association, Patrick T. Sheedy and Frederick A. Henderson,

Respondent-intervenors herein.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT 2

A. Proceedings below. 2

1. Proceedings in the district court. 2

2. Proceedings in the court of appeals. 3

B. Response to Petitioners' Factual Statement. 5

1. Wisconsin's reliance on at-large judicial elections. 5

2. Judicial candidates preferred by black voters have usually been elected. 6

3. Even limiting their analysis to elections in which black and white candidates competed, petitioners failed to prove the existence of legally significant white bloc voting. 7

4. Patterns of challenges to incumbents. 9

5. Paths to judicial office. 11

6. Socioeconomic differentials. 13

REASONS FOR DENYING THE PETITION 13

I. The Decision of the Court of Appeals Does not Conflict with this Court's Precedents Regarding the *Gingles* Precondition of White Bloc Voting. 14

II. The Court of Appeals Correctly Upheld the District Court's Consideration of Wisconsin's Interest in Balancing Judicial Independence and Accountability Through a System of At-Large Judicial Elections in Applying Section 2's Totality of Circumstances Standard. 17

CONCLUSION 21

CASES CITED

Abrams v. Johnson,
117 S. Ct. 1925 (1997) 14

Houston Lawyers' Ass'n v. Atty. Gen. of Texas,
501 U.S. 419 (1991) 17, 19

Johnson v. Transp. Agency, Santa Clara Cty., Cal.,
480 U.S. 616 (1987) 15

Thornburg v. Gingles,
478 U.S. 30 (1986) 3, 4, 5, 14, 16

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 2

U.S. Const. amend. XV 2

Wis. Const. art. VII, § 6 5

Wis. Const. art. VII, § 7 6

Wis. Const. art. VII, § 24(1) 6

OTHER AUTHORITIES

42 U.S.C. § 1973(a) 4

Section 2 of the Voting Rights Act,
42 U.S.C. § 1973 . . . . . 2, 3, 13, 14, 15, 17, 19, 20

S. Rep. No. 97-417, at 30 (1982),
reprinted in 1982 U.S.C.C.A.N. 208 4

No. 97-753

In The

Supreme Court of the United States

October Term, 1997

MILWAUKEE BRANCH OF THE NAACP, et al.,

Petitioners,

v.

GOVERNOR TOMMY THOMPSON, et al.,

Respondents,

WISCONSIN ASSOCIATION OF TRIAL JUDGES, et al.,

Respondent-Intervenors.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS AND RESPONDENT-INTERVENORS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet-Ap. 1a-13a) is reported as *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194 (7th Cir. 1997). The district court's August 1, 1996, decision following trial (Pet-Ap. 1b-74b) is reported at 935 F. Supp. 1419 (E.D. Wis. 1996).

The district court also issued a decision dismissing petitioners' constitutional claims on motion for partial summary judgment. The decision is not included in the appendix to the petition but is reported at 929 F. Supp. 1150 (E.D. Wis. 1996).

JURISDICTION

Respondents and respondent-intervenors (herein, collectively, respondents) agree with petitioners' jurisdictional statement.

STATEMENT

A. Proceedings below.

1. Proceedings in the district court.

Petitioners are black voters and residents of Milwaukee County, Wisconsin, and a citizen organization to which they belong. Respondents are the Governor of Wisconsin and the state's legislative leadership, sued in their official capacities. Respondent-intervenors are the Wisconsin Trial Judges Association and two Wisconsin trial judges.

Petitioners brought this action in the United States District Court for the Eastern District of Wisconsin, alleging that Wisconsin's method of electing trial and appeals judges through at-large elections violated the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

The district court granted summary judgment dismissing the petitioners' constitutional claims, holding that petitioners had failed to adduce any evidence that Wisconsin's method of electing judges had been adopted or maintained for discriminatory purposes. 929 F. Supp. 1150. Petitioners did not challenge the dismissal of their constitutional claims on appeal.

Following a seven-day trial to the court in July 1996, the district court issued a decision dismissing petitioners' Voting Rights Act claim. Pet-Ap. 1b-74b. The court first held that petitioners had "failed to meet their burden of establishing the existence of legally significant white bloc voting." Pet-Ap. 17b. In so holding, the court considered, *inter alia*, petitioners' estimates of white support for black candidates in judicial primary and general elections, the outcomes of contested primary and general judicial elections featuring black

candidates, patterns of electoral challenges to incumbent judges, including black incumbent judges, and evidence concerning the reasons for electoral losses identified by petitioners. Pet-Ap. 12b-17b.

The district court went on to hold that even if all three of the prerequisites under *Thornburg v. Gingles*, 478 U.S. 30 (1986), had been met, Section 2's "'totality of the circumstances' test [did not] support[ ] a finding that black voters in Milwaukee county are denied the same opportunities to participate in the political process and to elect representatives of their choice enjoyed by other voters." Pet-Ap. 17b. In reaching this conclusion, the court considered, *inter alia*, the state's interest in balancing judicial independence and accountability through a system of at-large elections, stating that this interest would not be outweighed by "marginal evidence of vote dilution" (Pet-Ap. 20b); the small pool of minority candidates eligible to run for judicial office in Milwaukee County; the absence of any history of official discrimination; disparities between black and white residents of Milwaukee County in areas of housing, employment, education and income, as well as the petitioners' failure to demonstrate these socioeconomic differences as attributable to any official or private discrimination; the success of black candidates in other elections; and the absence of any allegation or evidence of non-responsiveness on the part of Milwaukee County judges to the needs of minority residents. Pet-Ap. 17b-25b.

2. Proceedings in the court of appeals.

On appeal, petitioners challenged both of the district court's principal trial holdings. With respect to the issue of white bloc voting, the court of appeals concluded that the statistical evidence, "[t]ak[en] . . . at face value . . . leads straight to the conclusion that the district court's findings are not clearly erroneous." Pet-Ap. 6a-7a. The court of appeals rejected petitioners' challenge to the district court's consideration of patterns of challenges to incumbent judges, reasoning that "[o]ne good measure of white voters' willingness to support black candidates is the failure of white candidates to present

themselves for election even when a majority of the electorate is white." Pet-Ap. 7a.[1]

Petitioners also objected to the district court's consideration of non-racial explanations of electoral outcomes in its analysis of white voting patterns. The court of appeals agreed with petitioners that "[a] district judge . . . should not assign to plaintiffs the burden of showing *why* the candidates preferred by black voters lost; it is enough to show *that* they lost, if white voters disapproved these candidates en masse." Pet-Ap. 8a (emphasis in the original). But the court of appeals also recognized, contrary to the petitioners' assertions, that the district court *had not* "assign[ed] to plaintiffs the burden of showing causation." Pet-Ap. 9a. Rather, the district court simply permitted the respondents to introduce evidence regarding the reasons that certain candidates lost in order to rebut an inference that black voters were denied an opportunity to elect candidates of their choice "on account of race." 42 U.S.C. § 1973(a).[2]

Although not required to do so in light of its affirmance of the district court's judgment under the third *Gingles* factor, the court of appeals also reviewed and affirmed the district

---

[1]Petitioners' arguments on appeal frequently rested on misinterpretations of the district court's decision. For example, petitioners interpreted the district court's decision as treating the electoral success of black candidates in uncontested elections as a "bar [to] a finding of legally significant white bloc voting . . . ." Appellants' Br. at 1. The district court imposed no such bar but had simply considered patterns of challenges to incumbents as one piece of evidence in a "searching practical evaluation of the [electoral system's] 'past and present reality'" *Gingles*, 478 U.S. at 45, quoting S. Rep. No. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 208 (footnote omitted).

[2]The court of appeals observed, in any event, that "[v]ictories in other elections of candidates preferred by black voters, coupled with white voters' significant support for black candidates, relegates this part of the district court's analysis to the periphery." Pet-Ap. 9a.

court's decision under the totality of the circumstances standard. On appeal, petitioners objected to the district court's consideration of the size of the eligible minority candidate pool. The court of appeals ruled that consideration of this evidence was permitted. Pet-Ap. 9a-10a.

Petitioners also objected to the district court's analysis of Wisconsin's interest in preserving jurisdictional and electoral linkage for its judges. Petitioners' appellate argument interpreted the district court's decision as holding that such an interest either "justif[ied] the maintenance of a racially discriminatory scheme," (Appellants' Br. at 2) or "[p]revent[ed] the [f]ashioning of [r]elief" for such a system. *Id.* at 36. The court of appeals had little difficulty rejecting petitioners' interpretation, recognizing that the district judge "did not treat [the state's] interest as 'automatically' outweighing proof of vote dilution; he said no more than that the interest is weighty." Pet-Ap. 11a. The court of appeals properly understood petitioners to be asking it "to hold that . . . the only proper weight is zero (or, if not nil, so low that it can never tip the balance)." *Id.* The court of appeals did no more than reject the idea that the state's interest be assigned an automatic zero. Pet-Ap. 11a-13a.

B. Response to Petitioners' Factual Statement.

Petitioners' statement of the case reargues the trial evidence. As a result, it fails adequately to frame the issues claimed to warrant review. The following corrects or clarifies the principal omissions or inaccuracies contained in the petition's statement of facts. A fuller factual summary is contained in the district court's trial decision. Pet-Ap. 1b-74b.

1. Wisconsin's reliance on at-large judicial elections.

Wisconsin's reliance on at-large elections to elect its trial and appeals judges has been adhered to without either interruption or exception since Wisconsin's admission as a state in 1848. At all times since 1848, the Wisconsin Constitution has required elections in districts no smaller than a county, Wis. Const. art. VII, § 6, with each judge "chosen by the qualified

electors thereof." Wis. Const. art. VII, § 7. A synopsis of the institutional history of Wisconsin's judicial branch is contained in the parties' stipulation, incorporated in the district court's trial decision. Pet-Ap. 32b-35b. As previously noted, the district court dismissed petitioners' claim that this system had been created or maintained for discriminatory purposes as lacking any factual basis. 929 F. Supp. 1150.

2. Judicial candidates preferred by black voters have usually been elected.

Petitioners' discussion of voting patterns and election results is limited to elections in which black candidates ran. Yet, as the trial court found, only three percent of the pool of potential judicial candidates is black.[3] Not surprisingly, a significant number of elections are excluded from petitioners' analysis in which a black candidate did not run.

In elections involving candidates of all racial and ethnic backgrounds, candidates estimated to be supported by black voters were elected to the circuit court or court of appeals a majority of the time. From 1981 through 1996, the year of trial, the candidate preferred by black voters won ten of eighteen contested circuit court general elections. The black-preferred candidate lost six of these elections, although in one, the losing candidate is estimated to have been preferred by only a bare majority of black voters. (Estimation failed to identify a black-preferred candidate in two other elections.) Of the four contested elections for court of appeals since its creation in 1978, either the candidate preferred by black voters was elected or statistical estimation failed to identify a candidate preferred by black voters.

---

[3]Only attorneys who have been admitted to practice for at least five years may serve as judge. Wis. Const. art. VII, § 24(1).

3. Even limiting their analysis to elections in which black and white candidates competed, petitioners failed to prove the existence of legally significant white bloc voting.

Petitioners mischaracterize the evidence in the case when they describe elections in which black and white candidates competed as "characterized by consistent and severe racially polarized voting, with . . . the vast majority of white voters supporting the white candidate . . . ." Pet. at 3. Petitioners' support for this claim is that "[i]n 12 of 17 elections, white support for the black candidate ranged from 9% to 39%." *Id.* at 4.

This reductionist summary of white voting patterns is incomplete and misleading. Seven of these twelve elections were primary elections, with between three and seven candidates running and with voters permitted to vote for only one candidate. White support for black candidates in six of the primaries[4] ranged from 9% to 34.5%, with the black candidate advancing to the general election in five of them. A much larger percentage of white candidates - twelve of nineteen - did not survive these six primaries. Pet-Ap. 52b-61b. White

---

[4]In the seventh primary – the 1973 election for Circuit Court Branch 4 – the white incumbent and subsequent winner, Fred Kessler, appears to have been preferred by a plurality of black voters.

support for white candidates in these elections ranged from 4.6% to 50%. Pet-Ap. 14b.[5]

With respect to two-candidate general elections, between 1972 and 1996, there were ten contested general elections for circuit or county court in which one of the candidates was black. As estimated by petitioners' expert, white support ranged from a low of 22.7% for Stanley Miller in 1987, to a high of 62.6% for Clarence Parish in his 1981 election following appointment. As found by the district court, white support for black candidates averaged 40.25% over all ten general elections. Pet-Ap. 14b. The black candidate won 20% of these races, a percentage that is higher than the percentage of blacks among Milwaukee County's voting age population. Pet-Ap. 36b, para. 41.[6]

---

[5]Exhibit B to the parties' trial stipulation (Pet-Ap. 52b-61b) identifies every candidate who ran for county or circuit court or court of appeals in Milwaukee County between 1972 and 1996. The exhibit indicates incumbency, a candidate's status as a newly-appointed incumbent, the winners of the elections, candidates who advanced from primaries and whether a candidate was African-American, Hispanic or Native American. An error in the reproduction of this exhibit in the appendix to the petition omits to show that Fred St. Clair, a candidate for Circuit Court Branch 37 in 1980, was African-American. *See* Pet-Ap. 55b.

[6]In addition, there were two contested general elections for City of Milwaukee Municipal Court during the period 1972-1996, in which one of the candidates was black. As estimated by petitioners' expert, the white candidate was preferred by black voters in 1975. In 1989, the black candidate was preferred by both white and black voters, defeating a white challenger. Overall, since 1981, there were seven contested general elections for circuit or municipal judge in which one of the candidates was black. The black candidate was elected in three out of seven of these elections, receiving a majority of white support in two of these elections and roughly 50% in a third.

Petitioners' expert also estimated levels of white and black support in twenty-nine at-large, "exogenous" general and primary elections, *i.e.*, elections for offices other than circuit court or court of appeals, in which black and white candidates competed. In the eight general elections where black voters preferred the black candidate – in the other three general elections, the white candidate was preferred by both black and white voters – estimated white support for the black candidate averaged 64%.

Overall, in the eighteen judicial and non-judicial general elections examined by petitioners in which black voters supported black candidates against white opponents, the black candidate won eight of these races, receiving an average of 51% of the white vote. Finally, petitioners' expert did not find white voter turnout to increase in elections in which black candidates ran–a phenomenon known as counter-mobilization.

4. Patterns of challenges to incumbents.

An indirect measure of the existence or level of white bloc voting was the relative infrequency of challenges to black incumbent judges.

During the twenty-five year period 1972 to 1996, there were five such challenges. Prior to the 1996 election, the last time an incumbent black judge had been challenged was in 1984, while the last time an incumbent black judge had been defeated was in 1979. Until 1996, every such challenge had been to a judge recently appointed by the governor.[7] Appendix B to the district court's opinion (Pet-Ap. 74b) summarizes the election history of black incumbent judges. As can be seen, in seven consecutive elections beginning in 1981, every black incumbent judge was re-elected, in five cases

---

[7]Circuit judges are appointed in Wisconsin to fill vacancies resulting from a judge retiring or dying in office before the expiration of a full six-year term. An appointed judge does not serve the remainder of a predecessor's term but is required to stand for election at the next spring election, which is non-partisan. Pet-Ap. 32b, para. 21; 34b-35b, para. 35.

without opposition. During this same period, another two minority judges were elected without opposition. Pet-Ap. 60b.

More recently, from the time Governor Tommy Thompson took office in January 1987 until the time of trial, thirteen Milwaukee County circuit judges were appointed. Four of these judges were minorities, and two were black. Although none of the minority judges were challenged, three of the appointed judges faced an opponent when they first ran for election. One lost. Not only were none of the minority judges challenged, but in 1993, when both newly-appointed, black Circuit Judges Stanley Miller and Maxine White were required to first run for election, white challengers James Blask and Larraine McNamara-McBraw chose not to run against them, but ran instead against full-term white incumbent William Haese and newly appointed white incumbent Jeffrey Kremers. Pet-Ap. 58b-61b.

The only full-term African-American incumbent ever to face an election challenge was Judge Russell Stamper in 1996. Judge Stamper had previously won election in 1984 following appointment, receiving roughly 50% of white support. In 1990 he was re-elected without opposition. However, in 1996, a well-financed opponent succeeded in raising issues concerning Judge Stamper's personal and judicial character. As the district court found, the campaign was both unusually bitter and marked by Judge Stamper's failure to respond publicly to these accusations. Pet-Ap. 17b.[8] The evidence revealed that Judge Stamper's failure to respond was contrary to the advice of supporters and that his campaign was underfunded when compared to other incumbent judges' campaigns, as well as his own campaign twelve years earlier.

---

[8]Petitioners assert (Pet. at 7) that this election involved racial appeals, but the district court did not so find, but only assumed the fact for purposes of its "totality of circumstances" analysis. Pet-Ap. 24b.

Although a majority of white voters appear to have voted for his opponent in the 1996 election, Judge Stamper enjoyed substantial white support. Petitioners' expert testified that a shift of only 2% in the white vote would have resulted in Judge Stamper's reelection.[9]

The results of the 1996 contest were consistent with the trial evidence that challenges to full-term incumbent judges, while infrequent, always reflect a perceived special vulnerability on the part of the incumbent. Two of the four white, full-term circuit judges challenged between 1986 and 1993 were either defeated or withdrew from the election. Four of five white court of appeals judges lost, or withdrew from, contested elections. Pet-Ap. 54b-61b.

5. Paths to judicial office.

Petitioners contend that there exists a "clear racial divide in access to the bench under Wisconsin's electoral system . . . ." Pet. at 17. Specifically, black candidates are said to "face uncontested elections only if they are first appointed to a vacancy by the governor and none has ever reached the bench initially through a contested election." *Id.* Petitioners argue that in contrast, "white candidates are able to reach the bench through both election and appointment." *Id.*

---

[9]Subsequent to Judge Stamper's election defeat and after trial, Governor Thompson appointed another black lawyer to fill a vacancy in the circuit court. Pet-Ap. 21b. While occurring nine months after trial, and therefore not part of the trial record, we would note that in the 1997 spring election, the newly appointed judge was elected to a full term, without opposition.

But a black candidate ran for an open circuit or county court seat only six times between 1972 and 1996.[10] The district court heard substantial evidence regarding each of these elections, revealing that the winning white candidate possessed substantial political advantages unrelated to race.[11]

The subsequent career histories of black aspirants to judicial office are worth noting. Of the seven African-Americans who have run for circuit court since 1980, four have ultimately been elected, with or without opposition. A fifth, Louis Butler, was appointed and elected (without opposition) to the City of Milwaukee Municipal Court. Vel Phillips, who lost her election to County Court Branch 13 as a newly-appointed incumbent in 1973 (although receiving an estimated 44.5% of white votes), was subsequently elected Secretary of State of

---

[10]This assumes that the 1987 election for Circuit Court Branch 25 is regarded as an open seat election. In that race, incumbent Circuit Judge Gorenstein withdrew from the election after Assistant U.S. Attorney John Franke announced his candidacy. John Franke's strength as a candidate–strongly suggested by Judge Gorenstein's withdrawal–included his recent successful prosecution of the head of reputed organized crime family, and his having "locked up virtually all of the major endorsements including those of the Governor, the Mayor of Milwaukee and several prominent black leaders," Pet-Ap. 16b, before his opponent, black candidate Stanley Miller, had even announced his candidacy. At trial, now-Judge Miller described John Franke as having been "a very, very formidable opponent." July 12, 1996 Tr. at 60. This was the general election in which the black candidate received the smallest percentage of white support–approximately 23% by petitioners' expert's estimate.

[11]Petitioners' claim of divergent career paths fails to take into account the much larger number of failed white candidacies. The fact that white candidates were elected in twenty-one contested circuit or county court elections and five contested court of appeals elections, where the other candidates were also white, is not proof of divergent paths to judicial office, but a tautology. *See* Pet-Ap. 52b-61b.

Wisconsin in 1982, receiving a majority of the votes of Milwaukee County's white voters.

6. Socioeconomic differentials.

Consistent with the parties' stipulation (Pet-Ap. 38b-39b), the district court found "a significant disparity in Milwaukee county between blacks and whites in the areas of housing, employment, education and income." *Id.* at 23b. However, the district court went on to find that petitioners had "not adequately shown that these socioeconomic differences are attributable to past discrimination in Milwaukee county or in the state of Wisconsin." *Id.*

One fact providing context to the evidence of socio-economic differentials was that the socioeconomic status of blacks moving to Milwaukee County has been lower than the socioeconomic status of the African-American community as a whole. Pet-Ap. 38b-39b, 72b.

REASONS FOR DENYING THE PETITION

Petitioners ask that certiorari be granted in order to correct the court of appeals' claimed failure to adhere to this Court's precedents: (1) by "ruling that white bloc voting was not legally significant," Pet. at i, and (2) by ruling that "so long as [a] state has a 'sincerely held' belief that at-large elections are preferable," at-large judicial elections are exempt from the anti-dilution provisions of Section 2. *Id.* No other grounds for review are presented.

The specific "rulings" which are claimed to warrant review are largely misinterpretations of the court of appeals' decision. The decision below does not conflict with this Court's precedents. Rather, the Seventh Circuit's decision represents a proper application of established legal principles, including standards of review, to the district court's thoughtful examination of the trial evidence. Petitioners lost in the court of appeals because the district court's factual findings were fully supported by the record and because petitioners sought to recast those findings into rulings not made. Review of the court of appeals' decision will neither clarify nor advance the

interpretation of Section 2, but will simply delay finality in a case bearing on Wisconsin's right to secure and maintain a system of laws through the election of an independent and impartial judiciary.

I. The Decision of the Court of Appeals Does not Conflict with this Court's Precedents Regarding the *Gingles* Precondition of White Bloc Voting.

On appeal, petitioners asked the court of appeals to rule that the trial evidence *established* the existence of white bloc voting as a matter of law, notwithstanding the district court's finding that petitioners had failed to satisfy their evidentiary burden of demonstrating legally significant white bloc voting. The question for the court of appeals, therefore, was whether the evidence *permitted* the trial court's factual finding that legally significant white bloc voting had not been established, not whether the evidence required such a finding.

Answering this question, the court of appeals first determined that the parties' statistical estimates of white voter preferences led "straight to the conclusion that the district court's findings [were] not clearly erroneous." Pet-Ap. 6a-7a. Petitioners contend that the court of appeals misapplied *Abrams v. Johnson*, 117 S. Ct. 1925 (1997), by purportedly "treating the description of the level of white bloc voting in two Georgia electoral districts" in that case "as a nationally applicable cut-off for significant white bloc voting." Pet. at 20.

This argument plainly misconstrues the decision of the court of appeals, which in no way attempted to establish any cut-off for white bloc voting. The court of appeals did no more than observe that the dramatically lower levels of white support in *Abrams* did not compel a finding of legally significant white bloc voting. Accordingly, the court of appeals correctly concluded that the trial court had not committed clear error by refusing to find legally significant white bloc voting as a matter of law based upon the much higher levels of white support for black-preferred candidates in Milwaukee County elections.

The petitioners also suggest that the court of appeals should have found "legally significant" white bloc voting based solely upon the failure of a handful of non-incumbent black judicial candidates to be elected to the bench without having first been appointed. Petitioners argue that "[a]n election system does not provide equal opportunity if white candidates have two routes to the bench – election and appointment – but black candidates supported by black voters have only one route – appointment." Pet. at 18. The only "precedent" identified in the petition that the court of appeals purportedly did not follow consists of Justice O'Connor's opinion concurring in the judgment in *Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, 480 U.S. 616 (1987), a case concerning affirmative action job promotions permitted under Title VII. *See id.*

This issue does not warrant review, for it involves nothing more than the determination that the facts surrounding the six elections during the past twenty-five years in which a non-incumbent black candidate either ran for an open seat or challenged a sitting judge did not compel a finding of legally significant white bloc voting, particularly in light of the other evidence of white voting patterns. Moreover, non-statistical or "qualitative" evidence of the actual campaigns at issue revealed that when white candidates won in races in which black candidates competed, the candidate winning the election enjoyed considerable political advantages unrelated to race.

Petitioners also argue that the court of appeals "failed to recognize that lack of proportionality is always relevant to the Section 2 inquiry and supportive of a finding of vote dilution in this case." Pet. at 18. Petitioners' precise point is unclear. Certainly they do not mean to suggest that the court of appeals should have reversed solely because blacks do not occupy a share of Milwaukee County's judicial offices "proportionate" to the percentage of blacks in Milwaukee County's population. Section 2 would clearly prohibit any such conclusion. Nor can petitioners claim that the court of appeals failed to "consider" these statistics. It clearly did consider them, along with actual electoral results and the pool of eligible black candidates (*i.e.*,

lawyers with five years' experience), in concluding that these numbers did not compel a finding of legally significant white bloc voting.

Finally, petitioners argue that the Seventh Circuit "departed dramatically from this Court's teaching in *Gingles* when it relied almost entirely on black electoral success in uncontested elections to deny relief . . . ." Pet. at 20. The court of appeals did not rely "almost entirely" on this evidence. And the use of the phrase "to deny relief" suggests the court found a violation, but held it could not be remedied. In reality, the court of appeals considered and rejected the petitioners' argument that "the district court should have ignored the uncontested elections" altogether. Pet-Ap. 7a. The court of appeals rejected this exclusionary argument only after determining that the parties' statistical evidence of white voting behavior led "straight to the conclusion that the district court's findings [were] not clearly erroneous." Pet-Ap. 6a-7a.

This Court has never said that the ability of black candidates to deter potential challengers may not be considered in determining whether an at-large system of elections denies black voters the opportunity to elect candidates of their choice. Petitioners rely upon one of *Gingles'* definitions of white bloc voting, as requiring a showing "that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed . . . – usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. However, *Gingles* did not involve judicial elections, in which running unopposed is not a "special" circumstance, but is a relatively common (and perhaps desirable) occurrence. The court of appeals did no more than affirm the district court's common-sense conclusion, consistent with the statistical evidence of white voting preferences in contested elections, that if being a black candidate or a candidate perceived as supported by black voters were a substantial liability among a significant percentage of white voters, successful challenges to black incumbents would be more frequent. As noted in our factual summary, prior to the crippled candidacy of the black incumbent in the 1996

election, the last successful challenge to a black incumbent judge had been in 1979, with the defeated candidate one who had only recently been appointed to office. That black incumbents have for nearly twenty years been successful in "discouraging" opponents negates an inference of white bloc voting that denies blacks voters the opportunity to elect candidates of their choice.

II. The Court of Appeals Correctly Upheld the District Court's Consideration of Wisconsin's Interest in Balancing Judicial Independence and Accountability Through a System of At-Large Judicial Elections in Applying Section 2's Totality of Circumstances Standard.

Petitioners also seek review because, as they read the Seventh Circuit's decision, that court would somehow "exempt" at-large judicial elections from the Voting Rights Act any time a state possessed a "sincerely held belief" in the merits of matching the boundaries of a court's jurisdiction to the boundaries of a judge's electoral base. Pet. at 21. This, petitioners argue, conflicts with this Court's decision in *Houston Lawyers' Ass'n v. Atty. Gen. of Texas*, 501 U.S. 419 (1991), which made clear that a state's interest in "linkage," while entitled to substantial weight, does not immunize at-large systems from scrutiny under Section 2.

Petitioners' argument rests entirely upon a false premise. The Seventh Circuit did not hold that a state's "'sincerely held' belief in the legitimacy of the structure of its own judicial election system" would always trump evidence of vote dilution. Pet. at 22. To the contrary, petitioners construct a straw-man by plucking a phrase from the last sentence of the court of appeals' decision, tearing it from the context in which it was written, and vesting it with a meaning that a reading of the full decision simply does not support. The language relied upon by the petitioners did not give the "linkage" interest dispositive weight, but rather summarized the court of appeals' rejection of petitioners' contention that the district court had erred in affording this interest *any* weight.

Having affirmed the district court's finding that petitioners failed to demonstrate legally significant white racial bloc voting, the Seventh Circuit recognized that it could simply "stop and affirm the judgment." Pet-Ap. 9a. However, given the likelihood of a petition for a writ of certiorari and "the recurring nature" of the issues presented here, the court went on to consider the petitioners' arguments that the district court had erred in analyzing the totality of circumstances. One of the arguments advanced by the petitioners in support of this claim of error was that "the district judge erred in giving any weight to defendants' contention that judges should be elected from districts coterminous with the court's geographic jurisdiction." Pet-Ap. 9a. In resolving this question against the petitioners, the Seventh Circuit expressly recognized that the linkage interest could not automatically outweigh evidence of substantial vote dilution, but was an important factor in analyzing the totality of circumstances:

> Let us return, then, to the question whether the court may give weight to a state's asserted interest in matching the boundaries of a court's jurisdiction to the boundaries of the judges' electoral base. *Houston Lawyers' Ass'n*, 501 U.S. at 427, tells us that "the State's interest in maintaining an at-large, district-wide electoral scheme for single-member [judicial] offices . . . does not automatically, and in every case, outweigh proof of racial vote dilution." *Judge Gordon did not treat this interest as "automatically" outweighing proof of vote dilution; he said no more than that the interest is weighty.* In asking us to hold that this was error, plaintiffs really want us to say that the only proper weight is zero (or, if not nil, so low that it can never tip the balance). Such a conclusion would put us in conflict with en banc decisions of the fifth and eleventh circuits, which hold that this consideration is powerful, indeed dispositive unless the plaintiffs show gross racial vote dilution. *League of United*

> *Latin American Citizens v. Clements*, 999 F.2d 831, 872 (5th Cir. 1993) (en banc) (LULAC); *SCLC*, 56 F.2d at 1294-95; *Nipper*, 39 F.3d at 1543; accord, *Cousin v. McWherter*, 46 F.3d 568, 577 (6th Cir. 1995).

Pet-Ap. 10a-11a (emphasis added). This conclusion is entirely consistent with *Houston Lawyers' Ass'n*.

Accordingly, the Seventh Circuit did not, as petitioners claim, adopt an "intent" standard in analyzing the totality of circumstances under Section 2 and did not hold, as they suggest, that a system of electing judges ought to be upheld *whenever* a state sincerely believes in its legitimacy. The court said no more than that a "sincerely held belief" in linkage is entitled to some weight in analyzing a state's interest in the challenged electoral system under the totality of circumstances standard and that "the Voting Rights Act does not compel a state to disregard [its] belief that larger jurisdictions promote impartial administration of justice . . . ." Pet-Ap. 13a. In so holding, the Seventh Circuit did no more than affirm the district court's thorough analysis of all factors bearing on the "totality of circumstances," over the petitioners' assertion that there were things that the district judge was required to ignore, such as the circumstances of particular elections, the success of black incumbents, or the nature of the state's interest.

But, petitioners suggest, the Seventh Circuit must have regarded the sincerity of Wisconsin's belief as dispositive, because the state produced "no evidence" as to the strength of its interest. Pet. at 24. They argue that the "linkage" interest could not possibly be given substantial weight because there are some circumstances in which the state must depart from linkage and because the plaintiffs were able to produce some judges who believed the interest to be unimportant. However, as the Seventh Circuit observed, the district court had a great deal of evidence regarding the strength of interest, unbroken history and statewide application of the state's system of electing its judges.

The Seventh Circuit recognized that in adopting its system of matching a judge's jurisdiction with his or her electoral base, Wisconsin sought to balance the need for independence and impartiality with the desire for accountability. At-large elections minimize the role of factions and maximize a judge's accountability, by permitting *all* of the members of a community to play a role in the selection of *each* judge before whom the voters may appear. At-large elections assure that, for the most part, *all* who stand before a judge - whether as party, witness, or victim - know that the judge will some day stand before them. Such has been Wisconsin's system for nearly 150 years, and the state's interest, of sufficient importance to it to be imbedded in its constitution, is not so irrational or tenuous that it could be disregarded in assessing the totality of the circumstances.[12] Abandoning Wisconsin's 150-year tradition of allowing all voters in the jurisdiction to elect judges who will exercise the full authority of the court in those cases over which they preside will not serve the ends of racial justice. The creation of a balkanized system of "black" and "white" judicial branches will contribute nothing to actual, or even perceived, fairness.

Finally, the petitioners' claim, the Seventh Circuit "gave no weight to the countervailing strong national interest, expressed in the Voting Rights Act, of eliminating racial discrimination in the election process." Pet. at 25-26. Again, the petitioners incorrectly characterize the analysis of both the Seventh Circuit and the district court. These courts did not conclude that the state's interest in linkage obviated the need to consider evidence of vote dilution, only that Wisconsin's interest would outweigh the insubstantial evidence of dilution offered by the petitioners.

---

[12]None of the alternative schemes offered by petitioners would preserve this interest. Each was designed to permit judges to be elected by a segment of the community to ensure that they need not appeal to the community as a whole. All of these systems would abandon the state's compelling interest in balancing judicial independence and accountability and were properly rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JAMES E. DOYLE
Attorney General
PETER C. ANDERSON*
Assistant Attorney General
Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707
(608) 266-9595

THOMAS L. SHRINER, JR.
RICHARD M. ESENBERG
MICHAEL J. ABRAHAMIAN
Attorneys for Respondent-Intervenors

Foley & Lardner
Firstar Plaza
777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400

**Counsel of Record*

DECEMBER 1997